Supreme Court, U.S.
FILED

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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

LUFTHANSA GERMAN AIRLINES,

*Petitioner,*

vs.

LEONARD KRYS AND REBECCA KRYS,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Where an airline passenger suffers a heart attack during a flight and the damage to his heart wall is aggravated by the negligence of the crew, does the aggravation constitute an "accident" under the Warsaw Convention, a treaty of the United States?

2. In this case which occurred during an international flight over the high seas, should general maritime law govern issues which are not covered by the Warsaw Convention?

## PARTIES TO THE PROCEEDINGS BELOW

The parties before the Court and to the proceedings below are:

1. Petitioner Lufthansa German Airlines

2. Respondents Leonard Krys and Rebecca Krys

## CORPORATE AFFILIATIONS

1. Deutsche Lufthansa A.G. doing business as Lufthansa German Airlines has no corporate parents, subsidiaries, or affiliates the shares of which are publicly traded in the United States.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, Lufthansa German Airlines, ("Lufthansa") requests that a writ of certiorari issue to review the final judgement of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOW

The Court of Appeals' August 25, 1997 opinion affirming the district court's judgement (App. 4.) is officially reported at 119 F.3d 1515 (11th Cir. 1996) and can be found at 1997 WL 450150.[1]

The district court's October 24, 1995 findings of fact and conclusions of law (App. 39.) are neither reported nor published.

The district court's December 17, 1994 Order and opinion denying Lufthansa's motion for partial summary judgement (App. 57.) is neither reported nor published.

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[1] References to the Appendix are preceded by App. .

## JURISDICTION

The judgement of the court of appeals was entered on August 25, 1997; petitioner's petition for rehearing and suggestion of rehearing *en banc* was denied on November 7, 1997. App. 1. The jurisdiction of the Court is evoked under 28 U.S.C. § 1254(1).

## TREATY PROVISION INVOLVED

Warsaw Convention,[2] Article 17 of Chapter III, Liability of the Carrier, provides:

> The Carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damaged so sustained took place on board the aircraft or in the course of any of the operations of

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2 Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12,1 929, 49 stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted* in 49 U.S.C. § 40105 (1997) (note).

embarking or disembarking.

49 Stat. 3018.

## STATEMENT OF THE CASE

### A. Nature of the Case

While on a flight over the Atlantic Ocean from Florida to Germany, Respondent Leonard Krys, became ill. A doctor on board examined the plaintiff and cold the flight attendants that there was no need to make an emergency landing. Plaintiff never requested a landing. Shortly before landing at Frankfurt, the doctor noticed that the symptoms had changed and informed the crew that plaintiff was suffering a heart attack. Plaintiff recovered and sued Lufthansa. He claimed that the Lufthansa crew was negligent in not realizing that the doctor's advice was wrong; and negligent for not making an emergency landing, contrary to the doctor's advice. Plaintiff did not sue for any damage caused by the heart attack itself. Rather, he claimed that the crew's negligence proximately caused a permanent aggravation of the injury to his heart wall. Lufthansa defended on the basis, among others, that the alleged acts constituted an "accident" and that the Warsaw

Convention limited its liability.[3]

**B. The Warsaw Convention**

The Warsaw Convention is a multilateral treaty to which the United States has adhered since 1934. Since the Convention "is by far the most widely adopted treaty concerning private international law and after the United Nations Charter one of the most widely adopted of all treaties" (A. Lowenfeld, Aviation Law § 4.1, at 7-98 (2d Ed. 1981)), its significance to the aviation industry as well as its importance within the multilateral treaty system is beyond dispute. As a treaty of the United States, the provisions of the Warsaw Convention are the supreme law of the land. U.S. Const. Art. VI, cl. 2; *Air France v. Saks*, 470 U.S. 392, 406 (1985). The term "accident" should be "flexibly

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3 Since the occurrence of these events, Lufthansa as well as many of the world's major airlines have agreed to be strictly liable for damages caused by Warsaw Convention accidents for up to 100,000 Special Drawing Rights (approximately U.S. $145,000) and to be presumptively liable for damages caused by Warsaw Convention accidents above that amount without limitation. International Air Transport Association: Agreement Relating to Liability Limitations of the Warsaw Convention, approved by Department of Transportation Order 97-1-2, 1997 WL 4834 (D.O.T. Jan. 8, 1997).

applied" and has been interpreted "broadly enough to encompass torts committed by terrorists or fellow passengers." *Saks*, 470 U.S. at 405.

**C. The Proceedings Below**

Respondents sued Lufthansa in the United States District Court for the Southern District of Florida. The basis of jurisdiction was 28 U.S.C. §§ 1332 and 1605. They alleged that Lufthansa was negligent in failing to take adequate measures to determine Mr. Krys' medical condition which caused or aggravated his preexisting condition proximately causing further bodily injury.

Lufthansa moved for partial summary judgement on the grounds that an allegation of crew negligence, proximately causing an aggravation of the injury to plaintiff's heart wall, constituted an "accident" under the Warsaw Convention, and that plaintiff's damages were limited to $75,000. Lufthansa's motion was denied. App. 57.

A non-jury trial followed before Magistrate Judge Linnear Johnson. Because Judge Hurley had previously ruled that the Warsaw Convention was not applicable to this case, Magistrate

Judge Johnson tried the case pursuant to local law.

Lufthansa argued in its proposed findings of facts and conclusions of law that pursuant to general maritime law Lufthansa was not liable for following the advice of a trained physician on board who examined the plaintiff and advised Lufthansa that there was no need to make an emergency landing.

Judge Johnson's findings of fact stated that Lufthansa's negligence proximately caused significant damage to plaintiff's heart wall. App. 39-52. Lufthansa was adjudged liable to plaintiffs for compensatory damages in the amount of $2,400,000. App. 52-53. The Court dismiss-ed plaintiffs' claim for punitive damages App. 53.

Thereafter, the parties stipulated that, if attorneys' fees were recoverable, the amount of the fees would be $350,000.

On appeal, the Eleventh Circuit held that the cause of the aggravation of plaintiff's injury was not the doctor's advice to the crew that it was not necessary to land, nor was the cause the negligence of the Lufthansa crew. Rather, the cause of plaintiff's

injury was "the continuation of the flight and the resultant delay in hospitalization." App. 14-15 n. 10. The Eleventh Circuit then determined that while the cause of plaintiff's injury was a perfectly normal flight, Lufthansa was still liable under local law in an amount of approximately $2.75 million.

**REASONS FOR GRANTING THE WRIT**

Certiorari should be granted to resolve a direct conflict among the highest court of the State of New York, and the Third and Eleventh Circuit Courts of Appeals as to whether, pursuant to the Warsaw Convention, crew negligence proximately causing an aggravation of a preexisting health related injury constitutes an "accident," thereby assuring the application of the treaty to the facts of the case.

Certiorari should be granted also to clarify this Court's decision in *Air France v. Saks*, 470 U.S. 392 (1985), which the Eleventh Circuit misconstrues and is in apparent conflict. This conflict is important and recurring with several decisions in the lower courts, a current pending case, a large number of similar happenings which occur each year, and a case now on

petition before this Court which is awaiting the views of the Solicitor General to be filed.

The practical result of the decision below is to exclude from application of the Convention's coverage a significant type of case involving an airline's liability for negligently caused bodily injuries to its passengers. By this partial abrogation of the treaty, the Eleventh Circuit ignores its responsibilities to enforce the treaties of the United States.

## I

## THE DECISION OF THE ELEVENTH CIRCUIT BELOW AND THAT OF THE THIRD CIRCUIT DIRECTLY CONFLICT WITH A DECISION OF THE HIGHEST COURT OF THE STATE OF NEW YORK AND REWRITE A SIGNIFICANT PROVISION OF THE TREATY

As the panel admits (App. 16. n.11), *Seguritan v. Northwest Airlines, Inc.*, 86 A.D.2d 658, 446 N.Y.S.2d 397 (2d Dep't), *aff'd mem.*, 57 N.Y.2d 767, 454 N.Y.S.2d 991 440 N.E.2d 1339 (1982), directly conflicts with the decision of the court below on this issue of federal law. *Seguritan* is on

all fours with Lufthansa's position and stated:

> The "accident" is not the heart attack suffered by the decedent. Rather, it is the alleged aggravation of decedent's condition by the negligent failure of the defendant's employees to render her medical assistance.

86 A.D.2d at 658, 446 N.Y.S.2d at 398.

In direct conflict with *Seguritan*, the Eleventh Circuit concluded that the alleged aggravation of plaintiff's condition by the negligent failure of Lufthansa's employees to render him medical assistance was not an "accident." Rather, there was no accident because the cause of the aggravated injury was sitting on a perfectly normal flight. In the words of the court below:

> [I]f in the instant case, the aggravating event is the continuation of the flight from its scheduled point of departure to its scheduled point of arrival, [10] then it seems clear that the aggravation injury arises not from an "unexpected or unusual

> happening," but rather from the "passenger's own internal reaction to the usual, normal, and expected operation of the aircraft."
>
> 10. We identify this as the relevant event by asking what precise event or events allegedly caused the damage sustained by the plaintiff. In the instant case, it is clear that if the plaintiff suffered damage as a result of any external event, that event was the continuation of the flight and the resultant delay in hospitalization.

App. 14-15.

The error in the Eleventh Circuit's analysis is that this was not the normal operation of the aircraft. Crew negligence is not normal or expected. Had the aircraft been operated in the normal way it would have made an emergency landing. How is crew negligence aggravating the damage of a sick passenger's heart wall legally different from crew negligence causing hot coffee to spill on a well passenger's lap? Even the Eleventh Circuit indicated doubt about its own

analysis.

> This conclusion is not unassailable: as we suggested above, it is at least arguable that where injury is caused by crew negligence, the injury arises from an "unexpected or unusual event or happening external to the plaintiff."

App. 14.

Furthermore, if the *cause* of the aggravation injury was not the negligence of the crew, than the lawsuit should have been dismissed instead of holding Lufthansa liable for $2.75 million.

The Eleventh Circuit may have been led into error by following the law as applied by the Third Circuit in *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130 (3rd Cir. 1984), also in direct conflict with *Seguritan*. The Third Circuit applied the same faulty analysis in the analytically identical case of a passenger who became ill during a flight and alleged that crew negligence aggravated a hernia condition. The Third Circuit held, prior to this Court's decision in *Saks*, that "aggravation of a pre-existing injury during the course of a routine

and normal flight should not be considered an "accident... ." *Abramson*, at 133. "[T]he alleged acts and omissions of JAL and its employees during the routine flight on which Abramson was a passenger do not constitute an "accident... ." Id. *Abramson* did not refer to the conflicting *Seguritan* decision.

This erroneous interpretation, contrary to the text of the treaty and the intent of its drafters, is resulting in an enlarging loophole in the application of Article 17. This result is particularly undesirable where the main purpose of the Convention is to avoid the application of conflicting national laws by establishing uniform rules concerning air carriers' liability. It also directly conflicts with *Seguritan* and with this Court's interpretation of an Article 17 "accident."

## II

## THE DECISION BELOW CONFLICTS WITH THIS COURT'S DEFINITION OF "ACCIDENT" AS CONTAINED IN ARTICLE 17 OF THE WARSAW CONVENTION AND PRESENTS AN IMPORTANT AND RECURRING ISSUE

### A. The Decision Conflicts With This Court's Decision in *Saks*

The Eleventh Circuit misconstrued this Court's decision in *Air France v. Saks*, 470 U.S. 392 (1985), and their decision is in conflict with it. *Saks* concerned "whether a loss of hearing proximately caused by normal operation of the aircraft's pressurization system [where no person was alleged to have been negligent] is an 'accident' within the meaning of Article 17 of the Warsaw Convention... ." Id. at 395. Examining the text of the Convention, this Court concluded that "liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger." Id. at 405. It explained that the "definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries."

Id.

This Court also emphasized that "[a]ny injury is the product of a chain of causes, and we require only that the passenger be able to prove that *some link in the chain* was an unusual or unexpected event external to the passenger." Id. at 406, emphasis supplied. As found by the court below, the injury to plaintiff's heart wall did not result solely from the state of his health. Moreover, the negligence of the crew must have been "some link in the chain" of causation of plaintiff's injury. Had the crew's negligence not been "some" causal link, Lufthansa could not have been held liable.

But the court below did not follow *Saks*. Instead, it chose to follow the conflicting rule of *Abramson v. Japan Airlines, Co., Ltd.*, 739 F.2d 130 (3rd Cir. 1984), a pre-*Saks* case. Without precedent or analysis, *Abramson* held that while negligently injuring a well passenger constituted an accident, negligently injuring a sick passenger, by aggravating his injury, did not constitute an accident. The *Abramson* analysis, of course, directly conflicts with *Saks*.

Adding to the confusion, the court below based its conclusion, in part, on *Saks'* description of *Abramson*, which the Eleventh Circuit interpreted to be this Court's endorsement of the *Abramson* rule that negligent aggravation of a passenger's health related injury is not an "accident." As stated by the Eleventh Circuit:

> In particular, we note that in summarizing the *Abramson* decision in a parenthetical, the Court described the relevant event as "sitting in an airline seat during normal flight" notwithstanding the fact that the plaintiff had attempted to make out the Warsaw Convention claim based on the airline's "acts or omissions"-i.e. its negligence. *Air France*, 470 U.S. at 405... .

App. 15.

The reliance of the court below on this *Saks* passage is misplaced and taken out of context. *Saks* was emphasizing "routine travel procedures that produce an injury due to the particular internal condition of the passenger," in that part of the decision. *Saks*, 470 U.S. at 405. The issue of negligently causing an aggravation of a health related injury was not involved

in *Saks*, and the Court made no reference to that part of the *Abramson* decision which erroneously concluded that "the acts and omissions of JAL and its employees during the routine flight," do not constitute an "accident... ." *Abramson*, 739 F.2d at 133.

Either the negligence of the airline constitutes an accident and the airline is liable, or that negligence is not an accident and the airline is not liable. Granting *certiorari* would clarify *Saks* and correct the conflicting rulings of *Abramson* and the court below. Unfortunately, *Abramson* has been widely adopted by a growing number of courts and quickly should be put to rest.

**B. This Decision Presents an Important and Recurring Issue**

In addition to this case, several lower courts have also embraced *Abramson*, even after *Saks*, with the result that the "accident" aspect of Article 17 has been written out of the treaty in cases involving health related injuries aggravated by crew negligence. See, *Fischer v. Northwest Airlines, Inc.*, 623 F. Supp. 1064 (N.D. III (1985) (following *Abramson*, post heart attack crew negligence does not

constitute an accident); *Tandon v United Air Lines*, 926 F. Supp. 366 (S.D.N.Y. 1996) (same); *Northern Trust Co. v. American Airlines, Inc.*, 142 III. App. 3d 21; 491 N.E.2d 417 (1985) (same). Moreover, the same issue is pending in *McDowell v. Continental Airlines, Inc.*, No. 96-7238 Civ. Gonzalez (S.D. Fla.).

Furthermore, similar cases are likely to recur. While the statistical analyses concerning in-flight medical emergencies are somewhat limited,[4] they indicate that there are a significant number of in-flight emergencies each year worldwide. And because American residents comprise a large proportion of worldwide air transportation, a significant proportion of those emergencies will involve Americans and U.S. courts.

Finally, the meaning of the term "accident" under Article 17, as well as the issue of the Convention's exclusive application, is already before this Court in the petition of *El Al Israel*

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[4] See R.O. Cummins Frequency and Types of Medical Emergencies Among Commercial Air Travelers, 261(9) Journal of the American Medical Association, p.1295-9 (March 3, 1989); World Air Transport Statistics, International Air Transport Association, Montreal Canada, p. 5.

*Airlines, Ltd., v. Tseng*, No. 97-475, and this Court has invited the Solicitor General to file a brief.

Certiorari should be granted to clarify whether or not the definition of "accident" includes carrier negligence which aggravates health related injuries.

## III
## THE DECISION CONFLICTS WITH THIS COURT'S DETERMINATION OF WHAT LAW GOVERNS ISSUES NOT COVERED BY THE CONVENTION

In *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 116 S. Ct. 629, 636 (1986), this Court determined that where "the Convention itself contains no rule of law governing" a given question, a court should make "the normal federal disposition" and apply "that law which would govern in absence of the Warsaw Convention." *Zicherman* applied the Death on the High Seas Act because the tort, involving a death, occurred over the high seas. The court below, in conflict with *Zicherman*, applied Florida state law instead of general maritime law, even though the tort, involving an injury, occurred over the high seas.

The trial court's conclusions of law were silent on the issue of general maritime law even though two briefs by each side argued the issue.[5] Thereafter, the parties stipulated, for purposes of appeal, that the amount of plaintiffs' attorneys' fees, if recoverable, would be $350,000. In its initial brief to the Eleventh Circuit, Lufthansa argued that both general maritime law and the Convention preempted any state award of attorneys' fees, citing, *Zicherman; Sosebee v. Ruth*, 893 F.2d 54, 56 (3rd Cir. 1990) ("attorneys' fees pursuant to state statute...directly conflicts with federal admiralty law"); and *Boehringer Mannheim Diagnostics v. Pan American World Airways, Inc.*, 737 F.2d 456, 459 (5th Cir. 1984) ("the law of Texas which provides for attorneys' fees... is likewise preempted" by the Convention).

Concerning issues determined by the trial court, the Eleventh Circuit construed that the four briefs on the

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5 In 1994, Judge Hurley determined that the Warsaw Convention was not applicable. That ruling was treated as the law of the case, and in 1995 the trial proceeded pursuant to local law. Except for issues of admissibility of evidence, no law was argued at trial until the parties submitted their proposed findings of fact and conclusions of law.

issue by counsel submitted prior to the trial court's issuance of its findings of fact and conclusions of law on October 24, 1995, and the trial court's silence on the issue amounted to "a rejection [by the trial court] on the basis of untimeliness" and the court of appeals held that the issue was not fairly presented. App. 25. But the court of appeals was silent as to why it failed to follow *Zicherman* on the issue of attorneys fees which came up for the first time after the agreed judgement was entered on January 4, 1996, on appeal.

*Certiorari* should be granted to resolve the conflict between *Zicherman* and the decision of the court of appeals.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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